IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*

v.

GEORGE W. HARDEMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (A. 66-67) is officially reported at 420 F. 2d 485. It is unofficially reported at 73 LRRM 2208 and 61 LC ¶10,553.

JURISDICTION

The judgment of the Court of Appeals was entered December 22, 1969 (A. 83). On March 12, 1970, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to and including April 6, 1970. The petition was filed April 6, 1970, and the writ was granted May 25, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and bylaws for those of the union.

2. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

STATUTES INVOLVED

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (hereinafter referred to as the "Act"), 73 Stat. 523, 29 U.S.C. § 411(a)(5), provides:

> Safeguards Against Improper Disciplinary Action—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 102 of the Act, 73 Stat. 523, 29 U.S.C. § 412, provides:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Other relevant portions of the Act—Section 101(b), 29 U.S.C. § 411(b); Section 103, 29 U.S.C. § 413; Section 603, 29 U.S.C. § 523—are set out in an appendix of this Brief.

Relevant portions of the National Labor Relations Act, as amended, 49 Stat. 449—Sections 7, 8(b)(1)(A), 8(b)(2) and 8(a)(3), 29 U.S.C. §§ 157, 158(b)(1)(A), 158(b)(2) and 158(a)(3)—are also set out in the appendix.

STATEMENT OF THE CASE

On October 3, 1960, George W. Hardeman, a member of Local Lodge 112 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Local Lodge"), went to the union hall to see the business manager of the Local Lodge, Herman H. Wise, in an effort to obtain a job referral (A. 48, 49, 53-54).[1] One of the responsibilities of Wise as business manager was the referral of men to employers for jobs through the union hiring hall (Tr. 75, 77). When Wise said that he would have to see about it, Hardeman threatened Wise with violence if he would not give him a referral in the next day or two (A. 48, 49, 54).

On October 5, 1960, Wise left his office in the local union hall in order to go to a job site in the course of the performance of his official duties. Hardeman was in the lobby of the union hall. When Wise reached the lobby, Hardeman handed him a telegram concerning a referral to a job, and when Wise attempted to read it, Hardeman assaulted Wise, hitting him in the face and staggering him with other blows. W. C. Bell who had left the union office with Wise attempted to stop Hardeman, and E. T. Braswell who was present

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[1] The Single Appendix has been cited herein as "A." References to the district court trial transcript, contained in the original proceedings transmitted and certified by the clerk of the district court, have been designated "Tr." References to the plaintiff's and defendant's exhibits introduced at the district court trial have been designated "Pl. Ex." and "D. Ex." respectively.

told Bell not to interfere. Wise returned to his office and called the police.[2] On the following day after a hearing in a criminal court, Hardeman was fined $25 and costs of court for his conduct. (A. 43-46; P. Ex. 1, pp. 62-64; Tr. 60.)

Wise filed charges (A. 41-42) with the Local Lodge alleging that Hardeman's conduct constituted a violation of a provision in the Subordinate Lodge Bylaws[3] providing for punishment for any member who through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate or to attempt to restrain, coerce or intimidate any official of the Local Lodge to prevent or attempt to prevent him from properly discharging the duties of his office. The charges also alleged a violation of the Subordinate Lodge Constitution providing for expulsion upon conviction of any member who endeavors to create dissension among the members or works against the in-

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[2] Later in the day the police arrived at a time when Hardeman was not present. At that time when Wise stated to the police that Braswell, who was standing there, had been present during the assault by Hardeman, Braswell hit Wise and broke his nose. (A. 45; Pl. Ex. 1, p. 67.)

[3] The bylaw provision was Article XII (1) (D. Ex. 4 (A. 62); Tr. 388), providing:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

terest or harmony of any Subordinate Lodge.[4] Copies of the charges were served upon Hardeman on October 11, 1960. A full hearing was held before a local lodge trial committee of three members on November 12, 1960. At the hearing Hardeman was present and was represented by Robert Dobson, a union member. The hearing lasted from 10:00 a.m. to 7:15 p.m. Eight witnesses testified at the hearing, and a verbatim transcript of the hearing was made which consisted of 172 pages. (A. 39-42; Pl. Ex. 1.)[5]

The trial committee determined that Hardeman was "guilty as charged." The trial committee's determination was reported to the Local Lodge at the regular union membership meeting on December 3, 1960. The trial committee's determination of "guilty as charged" was sustained by a vote of the membership which voted by secret ballot to expel Hardeman from the organization "indefinitely." The vote in favor of expulsion was 59 for, 36 against. (Pl. Ex. 16 (A. 59); Tr. 128; Pl. Ex. 2; A. 56; Tr. 26-28.)

The Local Lodge's decision was appealed by Hardeman

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[4] The constitutional provision was Article XIII, Section 1 of the Subordinate Lodge Constitution (D. Ex. 5 (A. 63); Tr. 388), providing:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

[5] The above statement of facts is based upon probative evidence contained in the transcript of the hearing before the union trial committee (Pl. Ex. 1), excerpts from which are set out at A. 39-55.

to defendant, the International Union. Both the International President and, subsequently, the International Executive Council denied the appeal and sustained the action taken by the Local Lodge. (Pl. Exs. 5, 16 (A. 56-60); Tr. 35, 128.)

Subsequent to his expulsion, Hardeman signed the out-of-work list maintained at the union office and was referred to a job at which he worked for five days (A. 18). The union records show that he signed the out-of-work list twice—once before and once after the five-day job—and thereafter did not sign the out-of-work list (D. Ex. 3 (A. 61); A. 26-29). The job referral rules for employment required unemployed member and nonmember applicants to report and register each month as available for employment and stated that their name would be removed from the out-of-work list in the absence of such report and registration (D. Ex. 3 (A. 61); A. 29-31).

On April 4, 1966, more than five years after the disciplinary action was taken and sustained on appeal,[6] Hardeman filed a complaint in the federal district court purporting to base jurisdiction on Section 102 of the Labor-Management Reporting and Disclosure Act. 29 U.S.C. § 412. The complaint, filed against the International Union alone, prayed solely for damages, consequential and punitive, and did not seek reinstatement to membership. (A. 2-7.) The only evidence adduced at the district court trial relating to damages involved alleged loss of wages from the alleged failure of Hardeman to obtain and of the Local Lodge to refer him to employment as a boilermaker during the post-expulsion period (Tr. 114-119; 129; 147-149; 294-300; 316-333; 358-362; 368; 406-407; D. Ex. 3 (A. 61)). Hardeman testified only that, subsequent to the loss of his union card, he was unable to work in the boilermaker's trade beyond one job

[6] On September 12, 1963, Braswell had filed a complaint in the district court under Section 102, and on February 16, 1966, was awarded $12,500 in damages (A. 71, 69).

lasting five days (A. 19). He also testified, however, that, during the year *prior* to his expulsion, he only worked five days "out of the Local" (Tr. 129). Richard Kittrell, a witness called by Hardeman, testified that men work regularly out of the local without a union card (A. 35).

Mortality tables were introduced at the trial and Hardeman testified that he earned $5500-$6000 per year prior to his expulsion from the union (Tr. 127, 202). On this basis, counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least $130,231.52, which represented his past and future loss of wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (Tr. 413-417).

At the conclusion of the trial, the district court found as a matter of law that the expulsion was unlawful under the full and fair hearing clause of Section 101(a)(5) (A. 36-38). The court then charged the jury that it could find both compensatory and punitive damages (Tr. 446-447). The jury returned a verdict for Hardeman in the amount of $152,150.00, and the district court entered a judgment in that amount (A. 64-65).

The Court of Appeals affirmed. The court's *per curiam* opinion (A. 66-67) adopted the opinion in *International Brotherhood of Boilermakers, etc. v. Braswell*, 388 F. 2d 193 (5th Cir.) (A. 68-82), as the basis for its holding, describing that case as a case "arising out of the exact factual situation as that involved in the present case" (A. 67).

SUMMARY OF ARGUMENT

I.

Section 101(a)(5) provides procedural standards to be observed in union disciplinary proceedings. The scope of judicial review of such proceedings in cases involving this Section is limited to ascertaining whether such procedural safeguards have been provided. A reviewing court may not

substitute its own factual findings or its own interpretations of the union's constitution and bylaws for those made by the union.

The legislative history, including, among other things, the adoption of the Kuchel Substitute Bill of Rights which did not require, as did the McClellan Bill of Rights, that discipline be imposed solely for breach of published written rules of the union or that a transcript be made of union disciplinary hearings, demonstrates that Section 101(a)(5) was limited to the specified "procedural due process" standards and that great care was taken "not to undermine union self-government." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194.

The scope of judicial review must be viewed in the light of the Congressional intent and the role of the courts is to see that the enumerated safeguards were observed. In determining whether a full and fair hearing was had, state and federal court decisions show that a reviewing court should employ a standard of whether there is some evidence to support the union's determination. *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3rd Cir.). All the federal circuit courts of appeals which have dealt with the question have held that such a standard is the correct one to apply in a Section 101(a)(5) proceeding. That standard may be abused where a court, as here, articulates the standard but misapplies it by overreaching in rejecting or ignoring evidence which supports the union finding. The standard is subject to abuse also if the reviewing court substitutes its interpretation of a union's constitution and bylaws for the union's interpretation where that interpretation is not arbitrary and unreasonable. That principle is distilled from the common law. The court below mistakenly asserted a principle of strict construction which has no foundation in the language of the Act, the legislative history or the common law. The union's

interpretation of its organic law in this case was correct and, *a fortiori,* reasonable.

The facts in the instant case show that the respondent was expelled for committing a physical assault upon the business manager for the purpose of affecting the administration of the referral system. That such conduct violated the express bylaw provision against using violence to restrain, coerce or intimidate a union official in performance of his duties, as well as the constitutional provision against provoking dissension or working against the interest and harmony of the Lodge, is a correct determination and, *a fortiori,* is consistent with the some evidence rule.

II.

Where conduct arguably is protected or prohibited by the National Labor Relations Act, the National Labor Relations Board has primary exclusive jurisdiction and state and federal courts have no jurisdiction to regulate such conduct. *San Diego Building Trades v. Garmon,* 359 U.S. 236. Here the crux of the case is the employment relationship, the failure or refusal of the union to refer respondent to jobs. Respondent never sought restoration of union membership at any stage of the proceedings, either in his pleadings or at trial. While the respondent purported to be suing under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, he sought not membership rights but only a sum of money as damages for loss of job opportunities on a theory of lifetime unemployment. He sought no relief in equity. On the actual record of the case he did not at trial introduce any evidence of loss of union membership benefits such as insurance or retirement benefits. Hence, Landrum-Griffin Title I rights are not principally involved.

The union conduct which is principally involved is conduct which is either prohibited or protected under the National Labor Relations Act. For a union to refuse or fail to refer a non-member to employment through the union's

hiring hall because he is a non-member is a familiar and now classic unfair labor practice in violation of §§ 8(b)(2) and 8(b)(1)(A) of that Act. On the other hand, if the hiring hall conduct had been before the Board, its appraisal of the conflicting testimony might have led it to find the particular union conduct was protected under Section 7 as concerted activity in that any failure to refer respondent was due to his failure to comply with valid rules pertaining to the administration of the hiring hall. Hence, the principles of *Garmon* come into play.

This case is governed by *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, and *Local 207, International Ass'n. Bridgeworkers, etc. v. Perko*, 373 U.S. 701. *Borden*, too, was a hiring hall case. In *Borden*, as here, there was refusal to refer and in *Borden* and *Perko* this Court held that, where the suit "focuses principally, if not entirely on the union's actions with respect to [Hardeman's] efforts to obtain employment" (*Borden, supra*, 373 U.S. at 697), relief may be sought only from the Board and "the label affixed to the cause of action" does not control (*Borden, supra*, 373 U.S. at 698).

The Landrum-Griffin Act extended national labor policy to the relationship between unions and their members. Title I, the bill of rights, deals specifically with the relationship between union members and their union. Congress established certain membership rights which a union may not deny. But these rights are membership rights, not employment rights. The protection of job rights against unfair labor practices by management and unions was left to the Labor Management Relations Act. Congress did not intend, by enacting the Bill of Rights, to establish a duplicate system for administering §§ 8(b)(2) or 8(b)(1)(A) or 8(a)(3) or 7 of the NLRA by trial by jury in the federal district courts. The legislative history of Title I demonstrates that the body of preexisting law relating to the exclusive primary jurisdiction of the National Labor Relations Board

was left intact. This conclusion is reinforced by Section 603(b) of Landrum-Griffin providing that nothing in any title of Landrum-Griffin affects the right of any person under the NLRA. "Person" includes a labor organization, which is protected by Section 7 in the lawful operation of referral systems. Furthermore, to read Title I as affording union members rights to damages, past and prospective, on a theory of lifetime unemployment for conduct prohibited by the NLRA, while non-members would be restricted to the reinstatement and backpay remedy provided under the NLRA, is to give Congressional intent in enacting Landrum-Griffin an unlikely reading.

ARGUMENT

I.

The scope of judicial review of a union disciplinary case arising under Section 101(a)(5) of the Act is limited to the procedural due process requirements specified by said Section and does not warrant substitution of a court's factual findings and interpretations of the union's constitution and by-laws for those of the union.

Section 101(a)(5) provides that "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." On its face, this section is purely procedural.

A. *Legislative History*

The legislative history of the "Bill of Rights" Title (Title I) is in accord with the clear meaning of the statutory language. As stated by this Court in *NLRB v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175, 194:

> ". . . In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subject to discipline. Even then, some Senators emphasized that 'in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.' S. Rep. No. 187, 86th Cong., 1st Sess., 7. . . . Indeed that Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined, and enacted only procedural requirements to be observed.'"

Section 101(a)(5), and the "bill of rights" title must be understood against the backdrop of the hearings in 1957 and 1958 of the Select Committee on Improper Activities in the Labor or Management Field, popularly known as the "McClellan Committee," which provided the impetus for enactment of the Act. The Committee was principally concerned with the misuse of union funds by dishonest officers, illicit profits, violence and racketeering within a small group of labor organizations, and in its later days, with secondary boycotts and organizational picketing. These concerns were reflected by the committee's five "interim" recommendations in March 1958,[7] and later, by the recommendation in President Eisenhower's message on January 28, 1959.[8] Insofar as "union democracy" was concerned, the proposals were directed to trusteeships and elections and did not involve union disciplinary proceedings at all.

The Act began its course through the 86th Congress as S. 1555, the "Kennedy-Ervin" Bill. As introduced on March 25, 1969, and as favorably reported three weeks later by the

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[7] S. Rep. No. 1417, 85th Cong., 2d Sess. 450, 452.

[8] S. Doc. No. 10, 86th Cong., 1st Sess., NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, Vol. I, p. 80 (1959) (this 2 volume publication is hereinafter referred to as *"Leg. Hist."*).

Senate Committee on Labor and Public Welfare,[9] it contained no "bill of rights" title, being limited to reports and disclosures, elections, including the right of members to nominate and vote for officers and to hold office, trusteeships, and an encouragement to unions to voluntarily adopt codes of ethical practices. The bill contained a provision (§ 506(a)) analogous to Section 609 of the Act proscribing discipline for exercising the statutory rights afforded by the bill.[10]

The "bill of rights" title was offered as an amendment on the Senate floor by Senator McClellan on April 22,[11] and voted through on the same day by the narrow margin of one vote. The record vote was 47-46.[12] The strong opposition to this legislative measure regulating the internal affairs of trade unions resulted in the compromise draft of the "bill of rights" which was offered two days later by Senator Kuchel for himself and a number of other Senators as a substitute for the McClellan amendment.[13] On April 25, the "Kuchel Substitute" was adopted by a vote of 77-14.[14] That same day, S. 1555 passed the Senate.[15] In the House, the Landrum-Griffin Bill (H.R. 8400) was offered on the House floor on August 12, 1959, as a substitute for a committee-reported bill.[16] Although Landrum-Griffin differed substantially from S. 1555 in certain other respects, the provisions of its "bill of rights" title were substantially

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[9] S. Rep. No. 187, 86th Cong., 1st Sess. (April 14, 1959), I *Leg. Hist.*, p. 397.

[10] S. 1555, as reported, I *Leg. Hist.* 338.

[11] 105 Cong. Rec. 5810 (daily ed.), II *Leg. Hist.*, p. 1102.

[12] *Id.* at 5827, *Id.* at 1119.

[13] *Id.* at 5997, *Id.* at 1220.

[14] *Id.* at 6030, *Id.* at 1239.

[15] *Id.* at 6048, *Id.* at 1257.

[16] *Id.* at 14377, *Id.* at 1645.

the same as the Kuchel Substitute.[17] The "Bill of rights" title (Title I) then was passed unchanged by the House,[18] a Senate-House Conference,[19] and the Congress.[20]

With respect to disciplinary proceedings, the McClellan Amendment itself, while providing more restrictive procedural requirements than those finally adopted in the Kuchel Substitute, was limited to guaranteering specific enumerated procedures surrounding the disciplinary hearing. The McClellan Amendment included a prohibition against discipline "except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this Title" and a provision for "final review on a written transcript of the hearing by an impartial person."[21]

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[17] H.R. 8400, I *Id.* at 619.

[18] 105 Cong. Rec. 14532-14541 (daily ed. Aug. 14, 1959), II *Id.* at 1693-1702.

[19] H. Rep. No. 1147 on S. 1555 (Sept. 3, 1959), I *Id.* at 934.

[20] 105 Cong. Rec. 16435, 16653-54 (daily ed. Sept. 3, 4, 1959), II *Id.* at 1452-53, 1738-39.

[21] Section 101(a)(6) of the McClellan Amendment provided: "Safeguards against improper disciplinary action.—No Member of any such labor organization may be fined, suspended, expelled or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title. Disciplinary action may not be taken unless such member has been (A) served with a written copy of the provisions of the constitution and bylaws or other governing charter of such organization which contains a listing of the rights and safeguards afforded him pursuant to this title with respect to the conditions under which disciplinary action may be taken; (B) served with written specific charges; (C) given a reasonable time to prepare his defense; (D) afforded a full and fair hearing; and (E) afforded final review on a written transcript of the hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." 105 Cong. Rec. 5810 (daily ed.), II *Leg. Hist.*, p. 1102.

But, even the more extensive "McClellan Amendment" requirements were supported by their sponsor in terms of guaranteeing good faith by union officials and basic constitutional rights for union members.[22] And Senator Kennedy stated, with the apparent agreement of the Amendment's sponsors,[23] that the Amendment was more limited in the federal rights it established than the common law.[24]

The McClellan Amendment was subjected to attack by the sponsors of the Kuchel Substitute on the ground that the specified procedural requirements—particularly the "published rule" and transcript requirements—were excessively cumbersome and onerous in the context of union life.[25] As noted, the Kuchel Substitute, whose provision on union discipline was identical to Section 101(a)(5) of the Act, was overwhelmingly approved to replace the McClellan Amendment. Of significance was its removal from the McClellan Amendment of the requirements that discipline be imposed solely for breach of published written rules of the union, or that a transcript be made of union disciplinary hearings.

Following the Senate passage of S. 1555, Senator McClellan testified in favor of the Kuchel Substitute "bill of

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[22] 105 Cong. Rec. 5811-13 (daily ed., April 22, 1959), II *Leg. Hist.*, pp. 1103-05.

[23] The response by McClellan and the supporters of his proposal to Kennedy's argument was the necessity of including a clause precluding preemption of the common law. The result was Section 103, offered by Senator McClellan and adopted on the Senate floor. (105 Cong. Rec. at 5817, 5820, 6316 (daily ed., April 22, 29, 1959), II *Leg. Hist.* 1109, 1112, 1259.)

[24] 105 Cong. Rec. 5817-18 (daily ed. April 22, 1959), II *Leg. Hist.* 1109-10.

[25] *Id.* at 5811, 6024 (Senator Clark), 5819 (Senator Morse), 5826 (Senator Kennedy), *Id.* at 1103, 1233 (Senator Clark), 1111 (Senator Morse), 1118 (Senator Kennedy).

rights" before a Joint House Subcommittee.[26] McClellan asserted that the Substitute was intended as a compromise to his own Amendment, and stated that the Substitute was "a compromise bill of rights acceptable to the unions."[27] He stated that it was drafted "in consultation with the labor leaders of the AFL-CIO and others."[28] He emphasized that the country must continue to have strong unions,[29] that the "bill of rights" title was not needed for 90 or 95% of the unions,[30] that the title "provides minimum, not maximum standards,"[31] and that the language of the Substitute "is clear and explicit."[32] Once again, he recognized that "the real issue now in this proposed labor reform legislation" was the corruption, racketeering and exploitation by dishonest and criminal union officers tending to subvert the right of union memberships "to manage and control their internal affairs by recognized and respected democratic process."[33]

B. *State and Federal Court Decisions on the Appropriate Scope of Judicial Review of Union Disciplinary Proceedings*

As stated by Professor Cox in *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 838 (1960), "Section 101(a)(5) merely incorporates the common-law test of a fair hearing." The com-

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[26] *Hearings on H.R. 3540 Before a Joint Sub-Committee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., p. 5, at 2234-47, 2284-86 (1959).

[27] *Id.* at 2285, I *Leg. Hist.*, p. 1294.

[28] *Id.* at 2236.

[29] *Id.* at 2243.

[30] *Id.* at 2237.

[31] *Id.* at 2285, II *Leg. Hist.*, p. 1294.

[32] *Id.* at 2285, *Id.* at 1295.

[33] *Id.* at 2286, *Id.* at 1295.

on-law rule of fair hearing included the right to a hearing,[34] timely notice of the charges and of the time and place of hearing,[35] the right of the member to hear the evidence against him,[36] to examine and cross-examine and to present evidence in his own behalf.[37] Judicial review of disciplinary proceedings under Section 101(a)(5) would, of course, involve a review of the procedures followed to see that similar safeguards have been followed. The issues raised by the case at bar do not raise any question as to the fairness of the procedures followed in the internal union proceedings.

The issues that are raised involve the erroneous exercise of the scope of review by the court below in that it ignored the evidence before the union tribunals, which supported the determination that Hardeman violated the Subordinate Lodge Bylaws and the Subordinate Lodge Constitution, in violation of the "some evidence" rule as to the scope of review, and erroneously substituted its own interpretation of the provisions of the Union Constitution and Bylaws for the Union's interpretation, which interpretation was not unreasonable and not arbitrary.

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[34] *Cason v. Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 145-146, 231 P. 2d 6 (1951); see *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 154-55, 187 P. 2d 769 (1947); *cf. UAW Local 756 v. Woychik*, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958).

[35] *Bartone v. Di Pietro*, 18 N.Y.S. 2d 178 (Sup. Ct. 1939); *Cason v. Glass Bottle Blowers Assn., supra* at 144; *Fales v. Musicians Protective Union*, 40 R.I. 34, 56, 99 Atl. 823 (1917); *Gallagher v. Monaghan*, 58 N.Y.S. 2d 618 (Sup. Ct. 1945).

[36] *Cason v. Glass Bottle Blowers Assn., supra* at 144; *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S. 2d 114, *appeal dismissed without opinion*, 284 N.Y. 767, 31 N.E. 2d 514 (1940); *Fales v. Musicians Protective Union, supra*, 40 R.I. at 57.

[37] *Cason v. Glass Bottle Blowers Assn., supra* at 144; *Brooks v. Engar, supra; Fales v. Musicians Protective Union, supra; Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 602, 117 Atl. 102, *aff'd. per curiam*, 119 N.J. Eq. 377, 182 Atl. 874 (1935).

Most of the cases which have arisen in the federal courts involving the review of union disciplinary proceedings in suits brought under Section 102 of the Act, and all the courts of appeals which have addressed themselves to the issue—including the Fifth Circuit—have held that judicial inquiry into alleged violations of Section 101(a)(5) is governed by a standard of review which confines the reviewing court to the narrow area of determining whether there is *some evidence* to support the charges made. *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3rd Cir. 1969), *cert. denied*, 396 U.S. 866; *Vars v. Int'l. Bh'd. of Boilermakers*, 320 F. 2nd 576 (2nd Cir. 1963); *Int'l. Bh'd. of Boilermakers v. Braswell*, 388 F. 2d 193 (5th Cir. 1968), *cert. denied* 391 U.S. 935; *Burke v. Int'l. Bh'd. of Boilermakers*, 302 F. Supp. 1345 (N.D. Cal. 1967), *aff'd. per curiam*, 417 F. 2nd 1063 (9th Cir. 1969); *Rosen v. Painters Dist. Council 9*, 198 F. Supp. 46 (S.D. N.Y. 1961), *appeal dismissed*, 326 F. 2d 400 (2nd Cir. 1964); *Phillips v. Teamsters Local 560*, 209 F. Supp. 768 (D. N.J. 1962); *cf. Parks v. Int'l. Bh'd. of Elec. Wkrs.*, 203 F. Supp. 288, 307 (D. Md. 1962) ("[Disciplinary proceedings] must be conducted in accordance with the requirement of due process.").

The Third Circuit's opinion in *Lewis* contains, perhaps, the most comprehensive discussion of the problem and a persuasive showing of why any broader scope of review—including the substantial evidence test—was not intended for such proceedings. The Court characterized Congress' directive as supported by "sound judgment and policy" (407 F. 2nd at 1198), stating in part (407 F. 2nd at 1191):

> "There is sound reason for the adoption of a substantial-evidence test in legislation such as the Wagner Act, the applicable areas of the Administrative Procedure Act, and the LMRDA [*sic*] of 1947: federal agencies governed by these acts perform what has traditionally been regarded as an essentially judicial function, and but for these statutorily-created tribunals, the task of

adjudicating and enforcing the legislative mandate would fall to the traditional courts of law. Considering the potential which these agencies possess to render far-reaching decisions which significantly affect the national interest and recognizing that these 'legislative courts' are relatively new to the art of adjudication and the rule of precedent and tradition which inherently characterize the judicial function, it is eminently proper that these agencies be subject to close scrutiny by the courts.

"Similar considerations are not presented in problems of internal union discipline. Such matters generally have little impact beyond the organization itself. By their very nature they have no significance as precedents in any legal sense of the word; they involve matters of organizational discipline, essentially internal in concept and effect."

The Court in *Lewis* properly relied both on the "some evidence" rule which evolved as the generally articulated and accepted standard at common law and on this Court's holding in *Vajtauer v. Comm'r. of Immigration*, 273 U.S. 103, 106, to the effect that procedural due process requires not that an order be "correct" or based on substantial evidence but that "there was some evidence from which the conclusion . . . could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial." 407 F. 2nd at 1193, 1194. See also *Thompson* v. *Louisville*, 362 U.S. 199. The elimination of the written transcript requirement of the McClellan Amendment by the Kuchel Substitute was an implicit rejection of any fuller review process involving the evidence at the union trial.

The court below gave only lip service to the "some evidence" rule and, in fact, did not follow that rule. What it did was to substitute its own findings for those of the union membership. In so doing, the court below engaged in the kind of practice which led the *Lewis* court to emphasize the limited powers of courts in reviewing the evidence in union

disciplinary proceedings. The *Lewis* court said it was motivated to stress such limitations upon the judiciary "because . . . in reviewing the cases we have often detected fundamental differences between a court's articulation of the scope of review and its application of the announced standard" (407 F. 2nd at 1198). As this Court noted in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489, "A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application." The instant case may be a glaring illustration but it is not alone. See *Vars v. Int'l. Bh'd. of Boilermakers*, 302 F. 2nd 576 (2nd Cir.), as discussed in Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 227, 251-252 (1968);[38] *Kelsey v. Local 8, IATSE*, 418 F. 2nd 491 (3rd Cir.) (upsetting discipline on grounds of credibility of the charging party's testimony).

Even a "some evidence" rule can lead to abuse if, by reason of judicial overreaching in reviewing the meaning of the disciplinary charges (or the union rules on which they are based), evidence which could support the union's finding is improperly rejected as unsupportive. In the instant case, the courts below committed the second error as well as the first and improperly engaged in a full review of the (union) "law" as well as the (union) "facts."

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[38] In *Vars*, the court stated (320 F. 2d at 578):

> "The courts are not free to substitute their judgment for that of the trial court or to reexamine the evidence to determine whether it would have arrived at the same conclusion that was reached by the trial body. . . . However, implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made."

Christensen concludes that the court nevertheless engaged in a "rather detailed review and weighing of the various items of evidence" and substituted its judgment for that of the trial body as to the sufficiency of the evidence.

The common law enunciated by the courts with regard to the interpretation of a union's constitution and bylaws was that the union's interpretation of its organic law would govern unless such an interpretation was arbitrary and unreasonable. *Couie v. Local Union No. 1849, United Brotherhood of Carpenters, etc.*, 51 Wash. 2nd 108, 115, 316 P. 2nd 473 (1957); *Simpson v. International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 373, 98 S.E. 580 (1919); *Naylor v. Harkins*, 27 N.J. Super. 594, 605-06, 99 A. 2d 849 (1953); *De Mille v. American Federation of Radio Artists*, 31 Cal. 2nd 139, 187 P. 2nd 769 ,1947); *Way v. Patton*, 195 Ore. 36, 58, 241 P. 2nd 895 (1952); *Harrison v. Brotherhood of Railway & Steamship Clerks*, 271 S.W. 2nd 852, 854 (Ct. of App. Ky. 1954); *Savard v. Industrial Trades Union*, 76 R.I. 496, 510, 72 A. 2d 660 (1950).

The court below applied an erroneous standard of review of the union's constitution and bylaws. The court enunciated that standard in *Braswell* (A. 78) where it mistakenly asserted that "It is well established that penal provisions in union constitutions must be strictly construed." There simply is no basis for such an assertion. The cases cited, *supra*, support the principle of union self-government that interpretations of authorized union tribunals should not be set aside unless arbitrary and unreasonable. The court relied on its own prior decision in *Allen v. IATSE*, 338 F. 2nd 309, 316 (1964), which, in turn, cited a district court decision in *McCraw v. United Ass'n., etc.*, 216 F. Supp. 655, 662 (E.D. Tenn. 1963). *McCraw* (at 662) contains only a statement also quoted in *Braswell:* "In determining whether discipline was properly imposed . . . any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction." This statement in *McCraw* does not use the term "penal." Moreover, it is our view that the principles applicable to the draftsman of a commercial contract are not apposite when applied to the provisions of a union constitution which are

determined either by a referendum vote of the membership or by a convention of duly-elected delegates.[39] *Gonzales v. Machinists,* 142 Cal. App. 2nd 207 (1956), also cited by the court below in *Allen,* likewise contained no reference to construction of "penal" provisions, but held that a clearly erroneous interpretation by a union official of a definite and unambiguous provision was unreasonable. There the union imposed discipline without following the procedures clearly required by its own rules.

It follows, therefore, that the principle of strict construction asserted by the court below in *Braswell* is an erroneous standard of review. It is incompatible with the expressed view of this Court that Section 101(a)(5) is procedural only. Its assertion that union constitutional disciplinary provisions are to be characterized by the pejorative word "penal" has no basis in fact or in the intent of Congress in enacting 101(a)(5). In short, such an approach

> "may satisfy the urge to do 'justice' and to check what is felt to be intemperate use of union power, but they [applicable cases] are not based upon visible statutory authority for the scope of their review. Conversely, they establish judicial power in precisely the most damaging fashion, i.e. by making a union's interpretations of its own basic 'law' subject to the removed, untutored, and possibly antipathetic judgment of a court." Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy,* 43 N.Y.U. L. Rev. 228, 254 (1968).

The Third Circuit in *Lewis* likewise recognized that Congress did not intend to substitute judicial government for union self-government under the guise of review of procedural safeguards provided for in Section 101(a)(5) (407 F. 2nd at 1191-92):

"The reasoning of the Supreme Court in the 'Tril-

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[39] See D. Ex. 5 (Sub. Lodge Const., Art. XVI, Secs. 3, 18 (pp. 109-10, 113), Int'l. Lodge Const., Arts. II, XI (pp. 5-12, 41-43)); D. Ex. 4 (Art. XVIII), p. 9.

ogy' applies with equal force to cases arising out of internal union discipline. 'The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere . . . General supervision of unions by courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.' Gurton v. Arons, 339 F. 2nd 371, 375, 58 LRRM 2080 (2 Cir. 1964)."

The upshot is a return to the procedural "due process" underpinnings of Section 101(a)(5). As long as there is some evidence to sustain a union finding of violation under any interpretation of the charges which reasonable men could make, courts, in actions involving Section 101(a)(5), have exhausted their reviewing function. Procedural "due process" requires no more.

C. *Application of the Appropriate Standard of Review To the Facts of the Instant Case*

It is respectfully submitted that, whether the evidentiary test is formulated as: (1) it is a denial of due process to take action on charges "unsupported by any evidence";[40] (2) "implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made";[41] or (3) "a close reading of the record is justified to insure that the findings are not without any foundation in the evidence,"[42] the evidence presented to the trial committee of the Local Lodge was adequate to prove the charges under Article XII(1) of the By-laws and Article XIII, Section 1 of the Constitution of Subordinate Lodges. Indeed, it is our view that the evi-

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[40] *Lewis, supra,* 407 F. 2d at 1194.

[41] *Id.* at 1195.

[42] *Ibid.*

dence on both charges would satisfy even the "substantial evidence on the record considered as a whole" test imposed by specific statutory provision on the National Labor Relations Board by the Congress.

The pertinent language of Article XII(1) of the Bylaws reads as follows: "It shall be a violation of these Bylaws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

The undisputed evidence submitted to the Local Lodge trial committee was that Hardeman engaged in a physical assault upon business manager Wise for the purpose of effecting referral to employment by said business manager. Hardeman chose this method despite the existence of a joint labor-management referral committee whose function was to consider complaints by applicants for referral that the referral system was not being administered according to the contract or in a fair and equal manner (see Pl. Ex. 18; Tr. 404). Hardeman also could have filed a charge within the union against the business manager (see D. Ex. 5 (Int'l. Lodge Const., Art. V, Sec. 2-3), pp. 19 *et seq.*).

Hardeman testified that on October 1, 1960, he went to see a contractor named Leo Bonner who agreed to send a request to Wise that Hardeman be referred to him for employment (A. 48-49, 53-54). Hardeman testified that he went to the union hall on October 3 and told Wise about talking to Bonner and that Wise had a telegram from Bonner asking for Hardeman and that Hardeman was ready to go to work. Wise said he didn't know if he would send Hardeman or not. (A. 49.) Hardeman and Wise testified that Hardeman then threatened Wise with violence ("going around and around") if Hardeman didn't get the referral (A. 48, 49, 54). Hardeman further testified: "I went to the hall

Wednesday, October 5th, and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the local[43] or Wise or beat hell out of Wise, and then I made up my mind." (A. 49-50.) Hardeman sat down in the union hall and waited for Wise to come out of the office. When he did, Hardeman showed Wise a copy of a telegram from Bonner requesting the referral of Wise. (A. 50, 53.) After Hardeman handed the telegram to Wise, Hardeman hit Wise in the face (A. 43, 45). Union member Bullock testified that after the fight stopped, "Brother Hardeman was talking to the business manager in a loud tone of voice, saying something to this effect: 'Let this be a lesson to you, Wise, and don't jump me anymore on the work list.'" (A. 55.)

It would seem clear that the purpose of the bylaw which was the subject of the written charge was to deter the use of force and violence to affect the administration of union duties by union officers. If the "some evidence" rule is applied to these facts, there would appear to be no basis for a reviewing court to question the adequacy of the proof on which the finding of guilt was premised.

The federal district judge's charge to the jury is somewhat confusing on this point. The judge said at the conclusion of his charge concerning the lawfulness of the expulsion: "Now, that is all they charged him with were those two sections and there is nothing in this record that would justify a finding of guilty under those sections. All of it is about the fight." (A. 38.) At an earlier part of his charge, there seems to be a grudging admission that there were facts to support the finding of guilt under Article XII(1) of the Bylaws (A. 37):

> "Now there may be, and I am not ruling on it one way or the other but I will say this that there is evi-

[43] presumably by filing a charge with the National Labor Relations Board, a procedure with which Hardeman apparently was familiar (Tr. 152).

> dence in here which might support a finding of guilty under Section 1 of Article 12 of the Subordinate Lodge Bylaws, . . . "[44]

It is respectfully submitted that there is nothing in the federal district court's charge to the jury with respect to the evaluation of the evidence which would justify the conclusion that there was not some evidence to support the charge with respect to the Bylaws of the Local Lodge.

The *per curiam* opinion of the Court of Appeals assumed that this was the "exact factual situation" which had existed in the *Braswell* case and that the decision in the *Braswell* case was "dispositive of [the] issues" in this case (A. 67). The essential difference between the *Braswell* case and the *Hardeman* case is that the Court of Appeals interpreted Braswell's conduct as merely a blow struck in anger. Braswell was not seeking referral and, according to the Court of Appeals, was apparently not seeking to affect the administration of the referral system. Hardeman, on the other hand, clearly intended to affect the administration

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[44] Assuming the District Court here conceded the adequacy of evidence to support a finding of guilty under Article XII(1) of the Bylaws, its reliance (A. 37) upon a general verdict theory to upset the union discipline was erroneous. In the first place, it is clear that the union returned a special verdict when it found Hardeman "guilty as charged" (see D. Ex. 5 (Sub. Lodge Const., Art. XIV, Sec. 2(d)), pp. 98-99). In any event, there is no requirement that a special verdict be returned in union disciplinary proceedings. *Burke v. Boilermakers*, 302 F. Supp. 1345, 1352 (S.D. Calif. 1968), *aff'd per curiam*, 417 F. 2d 1063 (9th Cir. 1969). And, while *punishment* was not specified as to *each* provision, the accepted rule, even in criminal cases, has been that "the judgment must be sustained if either one of the two counts is sufficient to support it." *Classen v. United States*, 142 U.S. 140, 146 (criminal proceeding); *Burke v. Boilermakers, supra*, at 1352, 1354; see *St. Louis Southwestern Ry. Co. of Texas v. Thompson*, 102 Tex. 89, 98 (1908). In the instant case, expulsion was an allowable union action for violation of *either* provision. D. Ex. 4 (A. 62), D. Ex. 5 (Sub. Lodge Const., Art. XIV, Sec. 2(e) (p. 99), Art. XVI, Sec. 4 (p. 110)) (Bylaw Provision); D. Ex. 5 (A. 63) (Constitutional Provision).

of the union referral system when he struck his blows. It is clear that he was trying to make up his mind as to whether to use legal procedures or to secure more immediate relief by violence. According to Bullock's testimony, *supra* p. 25, it is apparent that Hardeman expected a future benefit from his application of violence to Wise's person.

The pertinent language of Article XIII, Section 1 of the Subordinate Lodge Constitution which was also made a subject of the written charges provides that:

> "Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Lodge; . . . shall upon conviction thereof be punished by expulsion from the International Brotherhood."

We have sought to show, *supra*, that the proper standard of judicial review of union interpretations is to refrain from judicial intervention unless the interpretation given by the union body is arbitrary and unreasonable. If such standard is applied to the facts in this case, it should be plainly evident that utilization of physical force as a method of securing change in the administration of the union referral system by its business manager is not consistent with the interest and harmony of the Lodge and does provoke dissension. At the very least, if the violence were to go unpunished it would constitute a bellwether for those in the union who might think they could employ the doctrine more successfully in their own interests.

It is respectfully submitted that, even under the erroneous strict construction rule of the Court of Appeals in the *Braswell* case, there is adequate evidence in the *Hardeman* case to prove a violation of the provisions of Article XIII, Section 1 of the Constitution of Subordinate Lodges. The Court of Appeals stated that "Article XIII, Section 1 of the Constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aims." It further stated that "Braswell's

fist was not such a threat. And that we find that the act charged to Braswell was a blow struck in anger, and nothing more." (A. 78-79.)

The ruling of this Court in *Radio Officers Union v. NLRB*, 347 U.S. 17, on a related issue arising under the National Labor Relations Act is instructive. This Court referred to its rulings in *Republic Aviation v. NLRB*, 324 U.S. 793, and similar cases under the Wagner Act as follows:

> "In these cases we but restated a rule familiar to the law and followed by all fact finding tribunals—that it is permissible to draw on experience in factual inquiries." 347 U.S. at 49.

The Court then gave consideration to the effect of the language with respect to "substantial evidence on the record considered as a whole" and its decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474. The Court stated:

> "There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result, for a fact finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned Taft-Hartley did not alter prior law."

It is respectfully submitted that, if an administrative agency such as the National Labor Relations Board operating under explicit statutory judicial review provisions may draw upon common experience to make reasonable inferences, *a fortiori*, a union trial body should have power to do so.

Violence provokes dissension[45] and works against the

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[45] The National Commission on the Causes and Prevention of Violence has pointed out that both group and individual violence has had a divisive effect, jeopardizing precious institutions such as

(Continued)

interests and harmony of the Subordinate Lodge. Thus, all five members who were present in the union hall at the altercation immediately became involved on opposite sides in Hardeman's dispute with Wise. It is reasonable to infer that the assault on the principal officer of the local union in connection with the performance of his official duties would tend to polarize sentiment and attitudes within the local. The union's determination that there was "dissension" in its view of the term created by Hardeman's attack is supported by the facts.

Certainly if the violence went unpunished a dangerous trend would develop in the methods used within the Local Lodge to resolve the grievances of the members and there would be a consequent weakening of the union's ability to function in a peaceful and orderly manner. This would work against the "interest and harmony" of the Subordinate Lodge.

For the reasons stated above, it is respectfully submitted that the determination of the union satisfies the applicable tests of the courts.

D. *Conclusion*

This case has presented much more than a technical issue as to the quantum of evidence required to support a union

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schools and universities "poisoning the spirit of trust and cooperation that is essential to their proper functioning" and "corroding the central political processes of our democratic society—substituting force and fear for argument and accommodation." *Final Report of the National Commission on the Causes and Prevention of Violence*, page xv (1969). Similarly, the use of violence in the form of a physical attack upon a union official has divisive effects among union memberships and encourages the use of force to effectuate changes in the administration of the tasks of a labor union in lieu of resort to the established peaceful internal processes of filing and processing charges of maladministration on the part of the union or filing claims with the contractually established joint referral committees whose function is to police the referral system.

disciplinary determination. The court below in this case exercised a scope of review of workingmen's internal proceedings and determinations of such breadth as to substitute its judgment for that of their tribunal. For the judiciary to engage in that kind of review under Section 101(a)(5) is impermissible. Congress has made it clear that the judiciary under Section 101(a)(5) is not to demand of workingmen a standard of performance they may not fairly be expected to meet. Congress has also made it clear that union self-government is important to the country and to the country's labor relations. Judicial review so stringent as to demand so meticulous a performance by union tribunals as to match the best performance of the federal trial judges makes impossible the internal self-regulation which Congress was careful to preserve in enacting the Labor-Management Reporting and Disclosure Act and will, thus, destroy workingmen's attempts to provide their own forms of justice. The destruction of institutions established by trade union groups which are essential for their self-government also has adverse implications for the stability of collective bargaining relations.

II

The National Labor Relations Act preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but the crux of the action is a claim for damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

A. *The Union Conduct Involved in This Case Is Conduct Which Was Clearly Prohibited or Protected by the N.L.R.A.*

The crux of this litigation as this case was tried was the failure or refusal of the union through its hiring hall to refer Hardeman to jobs. Hardeman never sought restora-

tion of membership. He did seek damages. The evidence adduced by Hardeman basically related to the rsfusal of the union to refer him to jobs which he claimed was due to the fact that he was not a union member (A. 17-20; Tr. 125-127). Thus, his proof of damages was devoted to job or employment rights. Neither in his complaint nor at any stage of the proceeding did he seek reinstatement to union membership and, while he referred in his complaint to loss of retirement and insurance benefits, he introduced no evidence in connection therewith.

The union conduct involved in this case involving refusals to refer respondent through the union hiring hall is either protected or prohibited under the National Labor Relations Act, as amended.[46] Discriminatory refusals by a union to refer through a hiring hall have long been held by the National Labor Relations Board to constitute violations of Sections 8(b)(2) and 8(b)(1)(A). *A. Cestone Co., et al.*, 118 NLRB 669 (1957), *enf'd.*, 254 F. 2d 958 (2nd Cir. 1958); *Local 138, International Union of Operating Engineers v. NLRB*, 321 F. 2d 130 (2nd Cir. 1963) (enforcing in part and remanding in part 139 NLRB 633); *NLRB v. Penobscot Bay Longshoremen's Local 1519*, 310 F. 2d 689 (1st Cir. 1962) (enforcing 136 NLRB 724); *NLRB v. Hod Carriers*, 392 F. 2d 581 (9th Cir. 1968) (enforcing 145 NLRB 1674 and 159 NLRB 1128); *NLRB v. United Brotherhood of Carpenters*, 369 F. 2d 684 (9th Cir. 1966) (enforcing 152 NLRB 629); *Lummus Company v. NLRB*, 339 F. 2d 728 (D.C. Cir. 1964) (enforcing in part 142 NLRB 517).

In *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 694, this Court pointed out that a refusal to refer because of an actual or believed failure to comply with internal union rules and a resulting

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[46] The statutory provisions involved—Sections 8(b)(2), 8(a)(3), 8(b)(1)(A) and 7—are set forth, in pertinent part, in the appendix of this brief.

inability to obtain employment is arguably a violation of Sections 8(b)(2) and 8(b)(1)(A).

This Court also pointed out in *Borden* that the Board might find in its appraisal of conflicting testimony that a refusal to refer was due only to the failure of the alleged discriminatee to comply with valid hiring hall rules and the union conduct would then constitute protected union activity within the meaning of Section 7 (373 U.S. at 695). See *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*, 365 U.S. 667; *United Association of Journeymen, etc.*, 159 NLRB 1119 (1966); *Pacific Maritime Association*, 155 NLRB 1231 (1965); *Local 1338, International Longshoremen's Association*, 179 NLRB No. 67 (1969), 72 LRRM 1369; *United Association of Journeymen, etc.*, 176 NLRB No. 50 (1969), 71 LRRM 1253.

Thus, Hardeman testified that he was continuously on the out-of-work list (A. 19). Herman Wise, business manager of Local Lodge 112, testified, on the other hand, that Hardeman did not keep himself on the out-of-work list as required under the rules of the hiring hall regarding job referrals (A. 29-33; D. Ex. 3 (A. 61)).

In any event, the conduct upon which this case was centered was conduct which was either protected or prohibited by the Act and surely at least arguably so.

B. *Neither State Courts nor Federal Courts Have Jurisdiction to Regulate Conduct Clearly or Arguably either Protected or Prohibited by the Act*

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the state as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." Here the union's conduct which was presumably found by the jury to have caused a loss of employment and earnings was its refusal or failure to refer Hardeman to jobs through the

hiring hall arguably in violation of Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act. Hence, the exercise of jurisdiction by the federal district court in the instant case was in error for the *Garmon* principle governs here.

In *Garmon*, this Court emphasized that the fundamental objective was to eliminate "potential conflicts" which the exercise of state jurisdiction might cause "with a complete and inter-related federal scheme of law, remedy, and administration" (359 U.S. at 242, 243).

The *Garmon* standard has been repeatedly followed in subsequent cases. *Longshoremen v. Ariadne Co.*, 397 U.S. 195; *Hattiesburg Building and Trades Council v. Broome Co.*, 377 U.S. 126; *Liner v. Jafco, Inc.*, 375 U.S. 301; *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690; *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union, et al. v. Jacob Perko*, 373 U.S. 701; *Construction Laborers v. Curry*, 371 U.S. 542; *Ex parte George*, 371 U.S. 72; *Marine Engineers v. Interlake Co.*, 370 U.S. 173; *DeVries v. Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Plumbers' Union v. County of Door*, 359 U.S. 354.

The Court below in *Braswell* referred (A. 73) to *International Association of Machinists v. Golzales*, 356 U.S. 617. There a union member had prevailed in a state court suit for restoration of membership and damages due to his illegal expulsion. This Court found that the state court litigation involved a breach of contract governing Gonzales and his union and "did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2)" (356 U.S. at 621-622). The Court held that under such circumstances the state court, having power to issue an order requiring Gonzales reinstated to membership, also had jurisdiction to "fill out" the remedy of rein-

statement by awarding him damages for loss of employment.[47]

Borden, supra, like this case, involved a hiring hall and a union's refusal of a job referral to the complainant. The refusal there was because the complainant member had sought work directly instead of through the union hiring hall. Suit was brought in a state court seeking damages for the refusal to refer. Borden claimed that the union defendants were guilty of a malicious and discriminatory interference with his right to contract and also among other things that "defendants had breached a promise, implicit in the membership arrangement, not to discriminate unfairly or to deny any member the right to work." 373 U.S. at 692. This Court found the state court suit preempted, stating (at 694):

> "The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the Union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8 (a)(3)." (Emphasis in original.)

The Court also pointed out, as stated above, that there was a possibility that the union conduct was protected concerted activity within the meaning of Section 7 of the Act.

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[47] In *Garmon*, the Court cited *Gonzales* as an exception to the preemption principle because the activities there regulated were of "merely peripheral concern of the National Labor Relations Act." *Garmon, supra,* 359 U.S. at 243.

The Court went on to say that, "The problems inherent in the operation of union hiring halls are difficult and complex, * * *, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency. *Borden, supra,* 373 U.S. at 695.

Borden and *Perko, supra,* 373 U.S. 702, placed *Gonzales* in its true perspective. In *Borden,* the Court distinguished *Gonzales.* The Court said (373 U.S. at 697):

> "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and *that the principal relief sought was restoration of union membership rights.* In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied." (Emphasis supplied.)

The Court went on to say (*id.* at 697-698):

> "The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action * * * concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.
>
> "Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. * * * In the present case, the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards."

In *Perko, supra,* a companion case to *Garmon,* the pre-

emption principles of *Garmon* were held by this Court to bar a state court suit for damages for the past and future loss of earnings where the complainant member asserted that the union had wrongfully interfered with his right to continue working as a foreman and thereby caused his discharge. This Court again found *Gonzales* inapplicable ond said, "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." 373 U.S. at 705.[48]

Here, the conduct alleged to have been engaged in by the union, which was respondent's real concern, was as in *Borden*, the refusal of the union to refer him to jobs. Hardeman claimed that the union's refusal to refer resulted in his inability to obtain employment. It was that conduct for which damages were sought. Hardeman was quite unconcerned with union membership. Rather he sought a sum of money based on a theory of lifetime unemployment which he attributed to the refusal of the union to refer him to jobs through its hiring hall. Such conduct is, of course, arguably subject to the prohibitions of Sections 8(b)(2) and 8(b)(1)(A) of the Act or is arguably protected by Section 7 of the Act. That is the type of conduct which was the subject matter of the lawsuit in *Borden* where this Court held such conduct was arguably prohibited or protected by the Act.

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[48] Whether *Gonzales* has any vitality in the light of this Court's decisions in *Borden* and *Perko* is open to question. *Day* v. *Northwest Division 1055 et al.*, 238 Ore. 624, 389 P. 2d 42 (1964), *cert. denied*, 379 U.S. 874. The court below apparently viewed the instant case as not arguably subject to the jurisdiction of the Board because, in their view, the dispute was "solely between a member and his union and [did] not directly concern rights [under] the NLRA" citing *Gonzales* (A. 73). Since *Gonzales* was predicated upon state power over restoration of union membership and Hardeman did not seek such relief the dispute centered about employment rights rather than membership rights and *Gonzales* is inapposite.

The so-called "Bill of Rights," of which Section 101(a)(5) is a part, refers to the rights of membership. The Labor-Management Reporting and Disclosure Act deals with the relationship between a member and his union, not with a member's employment relations.

Suits brought under Section 102 to enforce the bill of rights are suits to enforce a federal statutory right. To the extent that a suit brought under Section 102 deals with membership rights, such a suit is not preempted by the National Labor Relations Act. Thus, in a suit which seeks reinstatement to membership for a wrongful expulsion or suspension, there is no preemption by the National Labor Relations Act. In such a suit collateral relief in the form of consequential damages up to the date of restoration of membership or an offer to restore membership may be awarded. Membership, the statutory right comprehended by Congress, is not the aim of this suit. This Congressional objective is not pursued here and the subject matter of the suit simply does not come within the ambit of the "bill of rights." Hence, where, as here, the suit involved focuses "principally, if not entirely, on the union's actions with respect to Borden's [Hardeman's] efforts to obtain employment" (373 U.S. at 697), the National Labor Relations Act preempts." Here, as in *Borden*, "no specific equitable relief is sought directed to Borden's [Hardeman's] status in the union" and, thus, there is no federal remedy " 'to fill out' by permitting the award of consequential damages." (373 U.S. at 697.) The "crux" of the action here concerns Hardeman's employment relations and involves conduct arguably subject to the National Labor Relations Board's jurisdiction.

In the case at bar, as in *Borden*, "It is not the label affixed to the cause of action" that controls (*Id.* at 698). And in this case, as in *Borden*, ". . . the conduct on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by

the federal agency vested with exclusive primary jurisdiction to apply federal standards" (*Id.* at 698).

The court below incorporated by reference its opinion in *Braswell* as "dispositive" of the so-called preemption issue (A. 67). *Braswell* viewed the *Garmon* rule as limited to conflicts between federal and state policy (A. 72). This Court has held, however, that the preemption doctrine applies to federal courts as well as state courts. *Garmon, supra,* 359 U.S. at 265; *Vaca v. Sipes,* 386 U.S. 171, 179.

The rationale of preemption applies to federal courts as well as to state courts. The reasoning underlying the preemption doctrine is pertinent to support primary jurisdiction as an integral part of the dominant statutory objective of channeling through the National Labor Relations Board conduct over which that agency has cognizance. The original predicate of the preemption of state action was that not even a federal court could act in a dispute cognizable by the Board. In *Garmon,* this Court stated that "when an activity is arguably subject to § 7 or § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 245) (emphasis supplied). *Garner v. Teamsters Union,* 346 U.S. 485, preceded *Garmon.* And, in *Garner,* this Court said, "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so" (346 U.S. at 491). See also *Weber v. Anheuser Busch, Inc.,* 348 U.S. 468, 479 and n. 8. Action by a federal court, no less than by any other tribunal, creates "potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes" *Garmon, supra,* 359 U.S. at 242.

Whether, therefore, the issue in this case is viewed technically as "preemption" or as one of primary exclusive jurisdiction as between two federal tribunals, the National

Labor Relations Board has exclusive jurisdiction because, in the kind of circumstances presented in the case at bar, Congress intended that result for the same reasons which underlie both doctrines.

In substance, *Hardeman* seeks to recover money damages for the commission of an unfair labor practice. That the federal courts have no jurisdiction to undertake such an assignment has long been settled. Unless Title I of the Landrum-Griffin Act has had the effect of clothing each of the several hundred district court judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board, the federal district courts are without jurisdiction in cases of this kind. See *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948); *Amalgamated Association v. Dixie Motor Coach Corp.*, 170 F. 2d 902 (9th Cir. 1948); *Born v. Laube*, 213 F. 2d 407 (9th Cir. 1954), *cert. denied*, 348 U.S. 855. In *Amazon Cotton Mill Company, supra*, 167 F. 2d at 186, the court pointed out that the history of the National Labor Relations Act and the decisions rendered thereunder demonstrate,

> "that the purpose of that act was to 'establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined. H. Rep. No. 447, 74th Cong. 1st Sess. p. 24; S. Rep. No. 573, 74th Cong. 1st Sess. p. 15; *Agwilines, Inc. v. N.L.R.B.*, 5 Cir. 87 F. 2d 146, 150, 151; *Blankenship v. Kurfman*, 7 Cir. 96 F. 2d 450; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 58, 58 S. Ct. 466, 82 L. Ed. 646; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265, 266, 60 S. Ct. 561, 84 L.

Ed. 738; *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362, 365, 60 S. Ct. 569, 84 L. Ed. 799."

C. *The Bill of Rights, Title I of the LMRDA, Was Not Intended to Establish a Duplicate System For Administering Sections 8(b)(2), 8(b)(1)(A), 8(a)(3) or 7 of the National Labor Relations Act.*

Nothing in Title I of the Labor-Management Reporting and Disclosure Act demonstrates any intention on the part of Congress to change the method by which unfair labor practices are dealt with under the National Labor Relations Act and to vest the district courts with jurisdiction of such matters.

The Labor-Management Reporting and Disclosure Act represents the first major Congressional effort toward regulation of the internal affairs of unions. *NLRB* v. *Allis-Chalmers*, 388 U.S. 175 at 193. Section 101 (29 U.S.C. 411) deals specifically with the relationship between union members and their union. Congress established certain membership rights which a union may not deny. But these rights are membership rights not employment rights. The statutory text speaks in terms of "no member" or "any member."[49] Section 101(a)(5), which was the section under which Hardeman cloaked his claim, provides:

> "Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

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[49] See *Tomko* v. *Hilbert*, 288 F. 2d 625, 627 (3d Cir. 1961), where the court said:

> "A recapitulation of other pertinent provisions of the LMRDA clearly shows that its operation is narrowly focused on protecting the union-member relationship."

This section clearly speaks in terms of membership. The intent obviously was to enable a wrongfully expelled member to regain his membership, an objective which Hardeman forswore.

The court below in *Braswell* regarded Section 102 (29 U.S. 412)[50] as a grant of jurisdiction evidencing "congressional intent to confer jurisdiction on the federal courts to award damages for actions—even if these actions were arguably violations of the NLRA and within the jurisdiction of the NLRB . . ." (A. 73).

The mere fact that the federal courts are vested with jurisdiction to enforce the bill of rights, however, sheds no light on the question as to whether the federal courts in exercising that jurisdiction may regulate conduct normally subject to the exclusive primary jurisdiction of the National Labor Relations Board.

Section 103[51] and its legislative history indicates that the Congress was concerned with preserving the rights and remedies of union members under pre-existing federal and state law. Section 103 does not deal with the converse situation, namely where another federal law might be said to limit Title I rights. Thus, Senator Kennedy, when Senator

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[50] Section 102 provides:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

[51] Section 103 provides:

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

McClellan presented his Bill of Rights on the Senate floor, voiced the objection that:

> "[I]f the proposal were enacted, the present rather exhaustive remedies under the common law of various states might be wiped out, and only the rights suggested by the Senator from Arkansas would then be available to union members.[52]

Senator Kuchel characterized Senator Kennedy's argument as, "The argument that the amendment of the Senator from Arkansas might be interpreted as preempting the field."[53] Senator Kennedy later said, "Unless there were some changes in the doctrine of preemption, the present very adequate provisions of state law which protect members would be preempted."[54]

When Senator Kuchel introduced his version of the bill of rights, which was ultimately substituted for the McClellan proposal, it included Section 103 which, insofar as it referred to state and federal law, was identical to Section 103 of the Act.[55] Senator Kuchel said in connection therewith,

> "I thought the first point the able Senator from Massachusetts made was a valid one. He raised the question whether, if a Federal bill of rights for Labor were adopted, it would put at naught all State laws in the country protecting the working men.
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> "I arose, and interrupted my friend, the Senator from Massachusetts. I asked him whether he would yield. He did yield.

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[52] 105 Cong. Rec. 5816 (daily ed. April 22, 1959), II *Leg. Hist.* 1108.

[53] *Id.*

[54] *Id.* at 5817, *Id.* at 1109.

[55] Section 103 of the Kuchel Substitute provided:

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal."

> "I then asked my friend, the Senator from Arkansas, whether he would be willing to meet the valid argument of preemption, by offering to the amendment an appropriate nonpreemption amendment. After some discussion, the able Senator from Arkansas said he would; he did so, and the Senate approved it."[56]

Similarly, Senator Goldwater's statement following passage of the Act, referring to Section 103, used "preemption" in the sense of the LMRDA not preempting preexisting law:

> "Section 103 preserves any other rights and remedies which a union member may have under any other State or Federal law, or before any other court or agency, or under any union constitution or bylaws. It thus guards against the application of the preemption problem in connection with the newly granted bill of rights, and preserves any broader safeguards for union members which may be contained in some union constitutions or bylaws."[57]

This provision clearly safeguards the body of state and federal law which existed prior to the adoption of the bill of rights against preemption by Title I. And that is all that it does. It may fairly be said, therefore, that the body of preexisting law, relating to the exclusive primary jurisdiction of the National Labor Relations Board was left intact by Congress. In other words, no change was made in preexisting preemption doctrines. See *Rinker* v. *Local 24, Lithographers*, 201 F. Supp. 204 (W.D. Pa. 1962). It would appear, then, that the jurisdiction of federal courts, at least in cases where restoration of membership rights is not sought under the LMRDA, is preempted to the extent that such jurisdiction was preempted under the National Labor Relations Act prior to the enactment of Title I.

Moreover, Section 603(b) (29 U.S.C. § 523) of the LMRDA expressly provides that nothing contained in Title

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[56] *Id.* at 6020, *Id.* at 1229.

[57] 105 Cong. Rec. 19759 (Sept. 14, 1969), II *Leg. Hist.* 1845.

I "impairs or otherwise affects the rights of any 'person' under the National Labor Relations Act, as amended."[58] A labor organization is such a person, as defined in both Acts,[59] and union activity in the lawful operation of hiring halls is protected activity and is, therefore, a "right" under the NLRA. And this express reference to the NLRA reinforces the conclusion that that Act's application to conduct committed to exclusive primary regulation by the Board continues operative after the enactment of Title I and that Congress did not intend to leave issues involving the complex problems of hiring hall discrimination to determinations by jury trial in the federal district courts.

This case deals, as stated above, with employment rights rather than with membership rights. It has been held that the doctrine of preemption or exclusive primary jurisdiction must be determined on the basis of an employment rights-membership rights dichotomy. Thus, the Pennsylvania Supreme Court in *Spica* v. *International Ladies' Garment Workers Union*, 420 Pa. 427, 218 Atl. 2d 579 (1966), held that where an individual claimed wrongful removal from membership, and that as a result thereof her employment as a union officer ended and she was deprived of future opportunities for employment, the complaint must be dis-

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[58] Section 603(b) provides in full:

"Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

[59] Section 3(d) of the LMRDA (29 U.S.C. § 402(d)); Section 2(1) of the NLRA, as amended (29 U.S.C. § 152(1)).

missed because the matter was one arguably subject to the jurisdiction of the National Labor Relations Board. The court said (420 Pa. at 430):

> "However, it is unnecessary to dwell at length on this weakness in the plaintiff's case because her Amended Complaint clearly reveals that she has chosen the wrong jurisdiction in which to pursue her remedies. She asserts that, as a direct result of her expulsion as business agent and as member of the ILGWU, 'she has been deprived of her right to work in those places of employment in the industry, subject to the agreements between the ILGWU and its employers' association, and such deprivation of the value of $25,000.' It is thus obvious that the heart of her complaint is the injury done to her employment relationship."

The court, finding that because of the provisions of Sections 8(b)(2) and 8(a)(3) of the National Labor Relations Act the case was arguably subject to the Board's jurisdiction, dismissed the complaint.

Some federal courts have also considered that the application of preemption or primary exclusive jurisdiction to Section 101(a)(5) suits must be determined on the basis of an employment rights-membership rights dichotomy. *Barunica* v. *Hatters Local 55*, 321 F. 2d 764, 766 (8th Cir. 1963); see also *Green* v. *Local 705, Hotel and Restaurant Employees*, 220 F. Supp. 505 (E.D. Mich. 1963); *Forline* v. *Helpers Local No. 42, International Association of Marble Polishers*, 211 F. Supp. 315, 318 (E.D. Pa. 1962).

Finally, Congress, which in the federal regulatory scheme, took care to safeguard the rights of employees to refrain from joining unions (Section 7 of the NLRA), should not, in the absence of a clear intention to the contrary, be considered to have afforded union members greater rights and remedies against discriminatory operation of hiring halls than it afforded non-members. Section 101(a)(5) protects only union members. Section 8(b) extends equal protection

to members and non-members. If Hardeman is correct, union members may bring suits in federal courts for damages, both past and prospective, without seeking restoration of membership, while non-members may obtain from the NLRB only reinstatement and back pay.[60]

For the foregoing reasons, it is apparent that Congress did not intend to establish a duplicate system for enforcing the National Labor Relations Act in suits brought under Title I of the LMRDA.[60]

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[60] The cases cited by the court below in *Braswell* (A. 73-74) do not deal with the issues in the case at bar. In none of them did the plaintiff abjure the reinstatement of his membership and seek only damages for past and future alleged interference with employment opportunities.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded with direction to dismiss this action.

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